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Supreme Court of the United States

October Term, 1960

No. 511

HERMAN HOWZE,

Petitioner,

against

ARROW TRANSPORTATION COMPANY and ZURICH INSURANCE COMPANY,

Appellees.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioner prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on June 30, 1960.

Opinion Below

The opinion of the United States Court of Appeals for the Fifth Circuit in this case reported at 280 F. 2d 403.

Jurisdiction

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on June 30, 1960. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Questions Presented

1. In the absence of a determination that "there is no just reason for delay," as required by Federal Rules of Civil Procedure, Rule 54(b), what is the basis for determining whether the whole case has been adjudicated, and therefore the decision appealable, or whether the determination is subject to review at any time before the entry of judgment adjudicating all the claims, and thus not appealable?

(Had a similar situation been presented to the United States Court of Appeals for the Second Circuit and an appeal taken from the order of August 5, 1959, said Court of Appeals would have dismissed the appeal as prematurely taken).

2. What is the legal concept whereby a determination can be made as to whether or not judicial action dismissing a complaint as against one of several defendants constitutes a final and thus appealable order, by reason of the fact that such dismissal may render the action against the remaining parties academic?

3. Is an action wherein an answer has been filed by impleader of a third party one of multiple claims under the Federal Rules of Civil Procedure, Rule 54(b), or a single cause of action involving multiple parties?

Reasons for Granting the Writ

1. There is conflict of opinion between the decision of the Court below and the decision of the United States Court of Appeals for the Second Circuit in the case of *Luckenbach Steamship Company, Inc.*, third-party plaintiff-appellant v. *H. Muehlstein & Co., Inc.*, third party defendant-appellee; *Ellis Rando et al.*, plaintiffs v. *Luckenbach Steam-*

ship Company, Inc., et al., defendants, decided July 1, 1960, 280 F. 2nd 735.

2. The decision by the Court below has made certification under the Federal Rules of Civil Procedure, Rule 54(b) completely ineffectual.

3. It is important to have a legal basis for distinguishing between judicial action and its legal consequences, particularly as to judge-made rules.

4. To obviate confusion so that unnecessary labor would not be imposed on overworked appellate courts, as Circuit Judge Brown noted in his dissenting opinion in the Court below.

5. To obviate appeals, where several parties are sued, from every possible order—even those that name but some of the parties, so that, again in the words of Circuit Judge Brown in his dissenting opinion in the case at bar "• • • a prudent advocate will not run the risk of outguessing the Court of Appeals on when a many-partied-case is a multiple claim or merely a multiple party-single-claim affair."

Statement

Herman Howze, petitioner, a longshoreman, was injured on the 8th day of October, 1957. He suffered the loss of his left leg while in the employ of Alabama State Docks, in the hold of a vessel known as "Grain Barge ATC 107", owned and operated by Arrow Transportation Company.

Liability as to unseaworthiness was predicated on the fact that one of the cables operating a grain leg or scoop was loose and kinked and not reasonably safe for the purpose intended, in addition to other charges of unseaworthiness.

Negligence was predicated on the fact that the shipowner did not provide Howze with a reasonably safe place to work and reasonably safe gear to work with and about

Petitioner filed a civil action against the shipowner on October 7, 1958. The shipowner, Arrow Transportation Company, answered denying unseaworthiness and negligence and filed a third-party complaint against Zurich Insurance Company on December 19, 1958, the insurance company which had insured petitioner's employer.

On the 5th day of August, 1959, Arrow Transportation Company's motion for summary judgment against Herman Howze was granted.

On the 4th day of December, 1959, a final order of dismissal was entered by the aforesaid District Court.

Within thirty days and on the 28th day of December, 1959, petitioner filed his notice of appeal from the order of final dismissal of December 4, 1959.

It is not disputed that the judgment of the District Court granting Arrow's motion for summary judgment did not contain a certification that "there is no just reason for delay" and "an express direction for the entry of judgment" as required by Federal Rules of Civil Procedure, Rule 54(b) in actions involving multiple claims when final judgment upon less than all the claims is entered.

Zurich's answer to the third-party complaint included a claim against Howze for reimbursement for workman's compensation benefits paid to Howze or for the benefit of Howze by Zurich in the event Howze should recover from Arrow.

POINT I

There is a conflict of decision between the circuits of the United States Courts of Appeal.

There is a conflict of decision by the Court below with the decision by the United States Court of Appeals for the Second Circuit in the case of *Lockheed Steamship Company, Inc. v. H. Muehlstein & Co., Inc., supra*, on the ques-

tion of what constitutes the date of commencement of the running of the time to appeal in a situation as confronted this petitioner.

It is of universal importance to know what date constitutes final disposition of an action involving multiple suits, so as to obviate premature filing and safeguard against late filing of a notice of appeal, and to establish uniformity of decision as to such questions.

POINT II

The decision by the Court below has made certification under the Federal Rules of Civil Procedure, Rule 54(b) completely ineffectual.

Arrow's motion for summary judgment was granted on August 5, 1959.

Admittedly, the judgment of the District Court granting Arrow's motion for summary judgment does not contain a certification that "there is no just reason for delay" and "an express direction for the entry of judgment" as required by Federal Rules of Civil Procedure, Rule 54(b) in actions involving multiple claims when final judgment upon less than all the claims is entered.

Thereafter and on December 4, 1959 the Court entered an "order of final dismissal".

The affidavit in support of Zurich's motion to dismiss the appeal states (which statement is challenged by petitioner) that the order of December 4, 1959 was a mere nullity, the exact words being:

> "Therefore, the District Court's order entered December 4, 1959, whereby it purports to dismiss all of the other actions or claims in this case was a mere nullity as there was nothing whatsoever before the court requiring any action on its part."